WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2014

The cases listed below for Oct. 1 and Oct. 2 will be heard in Madison in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. The cases listed below for Oct. 7 will be heard in Room C215 of the Waukesha County Courthouse, 515 W. Moreland Blvd., Waukesha.

This calendar includes cases that originated in the following counties:

Dane
Milwaukee
Outagamie

WEDNESDAY, OCTOBER 1, 2014 [MADISON]

9:45 a.m.	-	12AP2490	Wis. Fed. of Nurses and Health Pros. v. Milwaukee Co.
10:45 a.m.	-	12AP2466	Suzanne Stoker v. Milwaukee County
1:30 p.m.	-	13AP1392	Runzheimer International, Ltd. v. David Friedlen

THURSDAY, OCTOBER 2, 2014 [MADISON]

9:45 a.m.	-	13AP578	State v. Ronald Knipfer
10:45 a.m.	-	13AP225	State v. Michael Alger
1:30 p.m.	-	11AP2956-CR	State v. Gary Monroe Scull

TUESDAY, OCTOBER 7, 2014 [WAUKESHA]

9:30 a.m.	-	13AP1163-CR	State v. Kearney W. Hemp
11:00 a.m.	-	13AP1638-FT	Outagamie County v. Michael H.
2:00 p.m.	-	13AP843-CR	State v. Danny Robert Alexander

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

- 12AP2695-D Office of Lawyer Regulation v. Khaja M. Din

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321 for cases to be heard in Madison or media coordinator Mark Krueger at (414) 586-2166 for cases to be heard in Waukesha. Synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 1, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Christopher R. Foley, presiding.

2012AP2490 Wis. Fed. of Nurses and Health Professionals v. Milwaukee Co.

This case involves a dispute over whether union members had a vested benefit contract that required the county to reimburse their Medicare Part B premiums when they retire from county employment, even though they were not yet retired when the county eliminated that benefit.

The Milwaukee County Circuit Court granted summary judgment in favor of plaintiff unions, the Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO and Association of Milwaukee County Attorneys. The circuit court ruled that the unions' members had a vested benefit contract that required the county to reimburse their Medicare Part B premiums when the members retire from county employment, even though they were not yet retired when the county eliminated that benefit.

The Court of Appeals reversed, and the unions appealed. The county and the unions present different interpretations of county ordinances and precedent cases in pressing their cases before the Supreme Court.

Some background: Since at least 1972, Milwaukee County has provided coverage under its employee group health insurance program to retired county employees who had been hired prior to certain specified dates and who retired with 15 or more years of service credits in the Milwaukee County Employees Retirement System (MCERS). Eligible county employees and their spouses would receive health insurance coverage at no premium cost. This insurance coverage included the county's reimbursement of the premium cost of coverage under Part B of Medicare. This retirement benefit was set forth in General Ordinance § 17.14(7), portions of which have been amended, renumbered or reworded at times over the years.

In 2010, § 17.14(7)(ee) was amended to remove the county's liability for Medicare Part B premiums for some county employees. The 2010 revision provided that § (ee) would not apply to members not represented by a collective bargaining unit who retired and began receiving benefits from the county employees retirement system after April 1, 2011. In 2011, the Medicare Part B premium provision was changed again. After the 2011 change, the county's liability for Medicare Part B premiums ended with respect to members of the retirement system who were not represented by a union and who retired and began receiving benefits after April 1, 2011; members of the retirement system who were represented by the Association of Milwaukee County Attorneys who retired and began receiving benefits after Dec. 30, 2011; and members of the retirement system who were represented by the Federation of Nurses and Health Professionals who retired and began receiving benefits after Dec. 31, 2012.

The county took the position that association members had to retire no later than Dec. 31, 2011, and federation members had to retire no later than Dec. 31, 2012, in order for the county to pay their Medicare Part B premiums.

The two unions filed a complaint seeking injunctive and declaratory relief. They alleged that the elimination of Medicare Part B reimbursements for bargaining unit members who did not retire before the deadlines in the 2011 ordinance constituted a material breach of their members' vested benefit contracts and impaired those contracts. The parties filed cross-motions for summary judgment. The circuit court, relying on Welter v. City of Milwaukee, 214 Wis. 2d 485, 571 N.W.2d 459 (Ct. App. 1997) granted the plaintiff's motion for summary judgment in its entirety.

The circuit court declared that the elimination of Medicare Part B reimbursement constituted a material breach of the affected employees' rights under their vested benefit contracts and was therefore invalid and ineffective as to those employees. The circuit court enjoined the county from refusing to reimburse any effected employee's post-retirement Medicare Part B premiums, and it ordered specific performance of that obligation. The county appealed. The Court of Appeals, with Judge Joan F. Kessler dissenting, reversed and remanded.

The Court of Appeals said the vested benefit at issue in this case was the eligibility to have the county reimburse a retiree's Medicare Part B premium. It said under Loth v. City of Milwaukee, 2008 WI 129, 315 Wis. 2d 35, 758 N.W.2d 766, this eligibility does not become an entitlement until all prerequisites are met, i.e. until the employee has actually retired. The Court of Appeals agreed that once eligibility matures into entitlement, a benefit may not be retroactively modified or eliminated.

The unions say employment contracts in Wisconsin, unless otherwise indicated, are bilateral, involving an exchange of enforceable promises of future performance. See Ferraro v. Koelsch, 124 Wis. 2d 154, 164, 368 N.W.2d 666 (1985). They argue rights and obligations under a bilateral contract are enforceable and vest immediately upon execution, subject to the occurrence or excuse of conditions precedent to performance. The unions say an obligation under a bilateral contract may be made conditional on the occurrence of a particular event, and a condition precedent under a contract delays the enforceability of the contract until the condition precedent has taken place. Thus, the unions argue that actually retiring was simply a condition precedent to union members being entitled to receive reimbursement for their Medicare Part B premiums.

The county argues, in essence, that the circuit court got it wrong in applying Welter and the Court of Appeals got it right in applying Loth. The county says the Court of Appeals appropriately concluded that the vested right at issue in this case is the right to eligibility for Medicare Part B premium payments made after completing all eligibility requirements, including actual retirement. The county reasons that because the Medicare Part B premium payment benefit was conditioned on retirement, the benefit was neither guaranteed nor vested until retirement had actually occurred.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 1, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge William S. Pocan, presiding.

2012AP2466 Stoker v. Milwaukee Co.

This case examines issues related to changes in the Milwaukee County retiree pension benefit formula.

Defendants, Milwaukee County and the Milwaukee County Pension Board, have both filed petitions for review from a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of the plaintiffs, Suzanne Stoker and Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO. The Court of Appeals agreed with the circuit court that a Milwaukee County Ordinance reducing the multiplier for the calculation of Milwaukee County retirement benefits for service performed after January 1, 2012 was invalid as applied to county employees who had vested rights in the higher multiplier before that date.

Milwaukee County states the issues as follows:

- Whether Milwaukee County may modify one element of its pension benefit formula prospectively, while making no change in the formula used for service previously rendered and credited.
- Whether the decisions of this court in Loth v. City of Milwaukee, 2008 WI 129, 315 Wis. 2d 35, 758 N.W.2d 766 and of the Court of Appeals in Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, et al. v. Milwaukee County, 2013 WI APP 134, 351 Wis. 2d 421, 839 N.W.2d. 869 (petition for review granted), prevail over and must be harmonized with Welter v. City of Milwaukee, 214 Wis. 2d 485, 571 N.W.2d 459 (Ct. App. 1997) and Rehrauer v. City of Milwaukee, 2001 WI App 151, 246 Wis. 2d 863, 631 N.W.2d 644.

The Milwaukee County Pension Board identifies the issues as follows:

- Whether Milwaukee County may modify one element of its pension benefit formula prospectively, while making no change in the formula used for service previously rendered and credited.
- Whether consent by a Milwaukee County employee's union is sufficient consent to a prospective reduction in a retirement benefit, under laws of 1945, Ch. 138 § 2(a).

At the time Stoker became a county employee, the multiplier for her pension formula was set at 1.5 percent by Milwaukee County General Ordinance § 201.24(5.1). Effective Jan. 1, 2001, Milwaukee County General Ordinance § 201.24(5.15)(1)(a) implemented a "recruitment and retention incentive" under which employees hired after Jan. 1, 1982 would acquire an additional 0.5 percent multiplier for each year of employment after Jan. 1, 2001 and the increased multiplier

would apply to prior years of each such employee's service at the rate of eight previous years of employment for each year served after Jan. 1, 2001. By 2006, a multiplier of 2.0 percent applied to all of Stoker's creditable service prior to that date.

In 2011, Local 5001 and the county entered into a memorandum of agreement whereby the multiplier was set at 1.6 percent for all creditable service on or after Jan. 1, 2012. Amounts accrued prior to that date under Milwaukee County Employee's Retirement System (MCERS) were unaffected. Neither Stoker nor any member of the class she represents personally consented to the reduction of their pension multiplier.

In December of 2011, Stoker and Local 5001 filed suit, seeking a declaratory judgment that Milwaukee County General Ordinance § 201.24(5.1)(2)(f) was invalid. They also sought an injunction prohibiting the county and the pension board from reducing the multiplier for Stoker's MCERS account and the accounts of those similarly situated, from 2.0 percent. All parties filed summary judgment motions. The circuit court concluded that Stoker and the members of the class had vested rights in the 2.0 percent multiplier that could not be reduced through collective bargaining. The court thus entered summary judgment in favor of Stoker and the class members. The court declared the ordinance invalid and prohibited the county and the pension board from reducing any class member's multiplier from 2.0 percent for service performed after Jan. 1, 2012. The county and pension board appealed. The Court of Appeals affirmed.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 1, 2014
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Milwaukee County Circuit Court, Judge William W. Brash, presiding.

2013AP1392 Runzheimer International v. Friedlen

This certification of an employment case by the District I Court of Appeals examines one main issue: Is consideration in addition to continued employment required to support a covenant not to compete entered into by an existing at-will employee?

Some background: In 2009, after defendant David Friedlen had been an at-will employee of Runzheimer International, Inc. for approximately 20 years, Runzheimer required Friedlen to sign a restrictive covenant agreement. The agreement prohibited Friedlen from providing "restricted services" to any of Runzheimer's competitors within the geographic area that he had covered during the course of his employment with Runzheimer. The agreement was a condition of Friedlen's continued employment and participation in Runzheimer's yearly incentive plan.

The agreement provided no additional benefit beyond the opportunity for Friedlen to remain employed. Friedlen remained an at-will employee who could be fired at any time without cause. The agreement did not increase Friedlen's salary, nor did it make him eligible for any incentives he had not been eligible for prior to signing the agreement. Friedlen said he felt forced to sign the agreement and understood he would be fired if he did not sign.

In late 2011, about two years after Friedlen signed the agreement, Runzheimer fired him. Soon thereafter Friedlen began working for Corporate Reimbursements Services, Inc. (CRS), a competitor of Runzheimer. Runzheimer sued Friedlen and CRS to enforce the restrictive covenant agreement. Runzheimer's amended complaint alleged claims for breach of contract (against Friedlen), tortious interference with contract (against CRS), and common law misappropriation of confidential information and tortious interference with prospective business relationships (against both defendants). Friedlen moved for summary judgment, arguing that the agreement was invalid because it lacked sufficient consideration. The circuit court agreed.

In its certification, District I notes that Runzheimer's argument is that the trial court's decision is contrary to Wisconsin's treatment of restrictive covenants entered into at the start of employment. See e.g., Wisconsin Ice & Coal Co. v. Lueth, 213 Wis. 42, 43-44, 250 N.W. 819 (1933). Runzheimer argues there should be no difference in how courts treat restrictive covenants entered into at the start of employment and those that are entered into many years later because "every day is a new day both for employer and employee in an at-will relationship." Copeco, Inc. v. Caley, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992).

Runzheimer also argues that Wisconsin should adopt a rule that continued at-will employment may suffice as consideration in situations such as this, but only after a court evaluates the circumstances occurring after the restrictive covenant was signed in order to determine if the agreement was reasonable. District I says that adopting this type of rule would require Wisconsin to make an exception to the traditional rule that "the law does not inquire into

the adequacy of the consideration to support a promise, only its existence." See Curtis 1000, Inc. v. Suess, 24 F.3d 941, 945 (7th Cir. 1994). But District I goes on to say such a rule would be consistent with Wisconsin law that all contracts must be entered into and fulfilled in good faith.

District I notes that Friedlen argues that this is not really an issue of first impression since Wisconsin law already clearly says that continued employment alone does not constitute sufficient consideration to support a covenant not to compete. See Star Direct, Inc. v. Del Pra, 2009 WI 76, ¶50, 319 Wis. 2d 274, 767 N.W.2d 898.

District I points out, however, that Star Direct did not involve a restrictive covenant entered into by an existing at-will employee. District I further notes that the Star Direct court said it was reasonable for a business to treat new employees differently from current employees since "employers may not compel their existing employees to sign restrictive covenants without additional consideration."

A decision by the Supreme Court is expected to clarify whether covenants not to compete entered into many years after employment begins require consideration and, if so, what constitutes consideration.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 2, 2014
9:45 a.m. (Knipfer)
10:45 a.m. (Alger)

These two cases involve reviews of separate decisions on similar issues: In State v. Knipfer, the District IV Court of Appeals (headquartered in Madison) affirmed a Dane County Circuit Court decision, Judge Nicholas McNamara, presiding. In State v. Alger, the District III Court of Appeals affirmed a Outagamie County Circuit Court decision, Judge John A. Des Jardins, presiding.

2013AP578 State v. Knipfer
2013AP225 State v. Alger

These two cases examine similar issues related to whether a ch. 980 petition for discharge, filed after the effective date of Wisconsin's adoption of the Daubert reliability standard for expert testimony, should be considered a new "action" (to which the Daubert standard would apply) or a continuation of the existing case that began when the original ch. 980 petition was filed.

Some legal background: Wisconsin's new Daubert standard applies to actions or special proceedings started on or after Feb. 1, 2011. Michael Alger's discharge petition was filed on April 21, 2011; Ronald Knipfer's discharge petition was filed in May of 2012.

Alger:

In May of 2004, the state filed a ch. 980 commitment proceeding seeking Alger's commitment as a sexually violent person. After a two day trial, a jury found that Alger was sexually violent. The circuit court ordered him placed in the custody of the Department of Health and Family Services and committed to a secure mental health facility. Alger filed petitions for discharge from his commitment in 2006 and 2007. Both were denied.

In January of 2011, the legislature amended Wisconsin's expert witness statute, § 907.02, to adopt the federal standard for the admissibility of expert testimony as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Prior to adopting the Daubert standard, testimony of a witness in Wisconsin "qualified as an expert by knowledge, skill, experience, training, or education" was admissible if "scientific, technical, or other specialized knowledge" would "assist the trial of fact to understand the evidence or to determine a fact in issue[.]" Sec. 907.02, Stats. (2009-10).

Under the revised version of the statute, the circuit court must also conclude that the expert's testimony "is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Pursuant to 2011 Wis. Act 2, § 45(5), the new reliability standard first applies to actions or special proceedings that are commenced on the effective date of this subsection, which was Feb. 1, 2011.

On April 21, 2011, Alger filed another petition for discharge from his ch. 980 commitment. The state conceded that the petition stated sufficient facts to warrant a full discharge hearing. Alger then filed a motion in limine seeking to preclude the state from introducing certain expert testimony relating to Alger's risk of reoffending. Alger claimed the

challenged testimony would not satisfy the new Daubert standard. The state responded that the new standard did not apply to Alger because his discharge petition did not constitute an action or special proceeding commenced after Feb. 1, 2011. In the alternative, the state argued that, even if the new standard did apply, the challenged testimony met the standard.

Alger filed another discharge petition on Nov. 23, 2011. The circuit court ordered the two petitions merged for trial. Alger filed a supplemental motion in limine, arguing that if the new reliability standard did not apply to his discharge petitions, it violated his right to equal protection.

The circuit court denied Alger's original and supplemental motions in limine. The court reasoned that a petition for discharge from a ch. 980 commitment did not create a new civil action. It also held that the new reliability standard did not violate Alger's right to equal protection.

The case was tried to a jury. The state introduced the type of expert testimony that Alger's motions in limine had sought to exclude. The jury found that Alger was still a sexually violent person, and the circuit court entered an order denying his discharge petitions. Alger appealed, and the Court of Appeals affirmed.

Alger raises the following issues:

- Did the circuit court err in concluding that despite the fact that Alger filed petitions for discharge after the effective date of amendments to Wis. Stat. § 907.02(1) (2011-12), those amendments did not apply to the proceedings on those petitions because the "action" was "commenced" with the filing of the petition for commitment in 2004?
- Does Wis. Stat. § 907.02(1) violate Alger's rights to Equal Protection if it is deemed to be inapplicable to discharge petitions he files after the effective date of the statute?

Knipfer

Knipfer was committed as a sexually violent person in 2003. In May of 2012, he filed a petition for discharge. The circuit court concluded that the pre-Daubert version of § 907.02(1) applied to the petition, and the court rejected Knipfer's claim that failing to apply the new version of the statute amounted to an equal protection violation. The circuit court denied Knipfer's petition for discharge. Knipfer appealed, and the Court of Appeals, applying its recent decision in Alger, affirmed.

Knipfer raises the following issues:

- Does a Chapter 980 petition for discharge filed after the effective date of the statutory revision adopting the Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) reliability standard for expert testimony commence a new action subject to the revised standard, or does a discharge petition merely continue the original 980 proceeding, so that a patient whose original commitment was initiated prior to Feb. 1, 2011, will remain subject to the otherwise abandoned evidentiary standard in all future discharge proceedings?
- If the revised standard governing the admissibility of expert testimony does not apply to Knipfer's present and future discharge proceedings simply because his original commitment was initiated prior to Feb. 1, 2011, does this statutory revision violate Knipfer's rights to due process and equal protection of the law?

- In assessing whether the disparate evidentiary treatment of Ch. 980 discharge trials violates equal protection of the law, should a reviewing court apply strict scrutiny or a rational basis standard?

The state argues that the Court of Appeals has correctly held that discharge proceedings are a continuation of the underlying commitment proceedings, not a new "action or special proceeding" to which the Daubert rule applies. According to the state:

> *Alger suggests that the Daubert statute imposes reliability standards where none existed before. He casts the pre-Daubert regime as an evidentiary Wild West in which even the most unreliable junk science was admissible. He also implies that expert risk assessment evidence in ch. 980 cases almost certainly will be inadmissible under the Daubert statute. This is a false dichotomy and a premature conclusion . . . . It remains unclear whether and how much the Daubert statute really will change what expert testimony is admitted in Wisconsin…*

The state goes on to argue that the legislature's adoption of a revised evidentiary standard for expert testimony in no way impugns the prior standard and/or related proceedings under that standard.

The state also says the Court of Appeals correctly held that the Daubert statute does not violate Alger's or Knipfer's right to equal protection. The state says the new statute obviously had to take effect at some time, and it says the Court of Appeals correctly held that the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 2, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge David L. Borowski, presiding.

2011AP2956-CR State v. Scull

The general issue in this case is whether the trial court erred in denying defendant Gary Monroe Scull's motion to suppress evidence found by police after they brought a drug-sniffing dog to the front door of his residence without a warrant or probable cause.

More specifically, the Wisconsin Supreme Court examines whether the good faith exception to the exclusionary rule applies because the police obtained a search warrant in good faith –although based, in part, on the prior illegal search with the drug dog.

The Wisconsin Supreme Court considers the case in light of a U.S. Supreme Court decision reached after the trial court denied Scull's motion to suppress, and after Scull filed his notice of appeal. The U.S. Supreme Court ruled that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *See* Florida v. Jardines, 569 U.S. ___, 133 S. Ct. 1409, 1417-18 (March 26, 2013). Thus, under Jardines, the police undisputedly violated Scull's Fourth Amendment rights when they brought a drug-sniffing dog to the front door of his residence without a warrant or probable cause. However, at the time the court commissioner signed the search warrant in this case, there was no Wisconsin or U.S. Supreme Court precedent directly addressing whether a drug sniff outside a defendant's residence was a Fourth Amendment search.

Some background: In the summer of 2010, police followed up on a confidential informant's tip that Scull was distributing cocaine base in the city of Milwaukee. Relying on the information from the confidential informant about Scull's vehicle and home address, a police detective took a trained drug-sniffing dog to Scull's residence. The dog alerted. Based on information from the informant and the dog's alert, police applied for and obtained a search warrant for Scull's residence, where police found drugs and drug-trafficking paraphernalia.

After seeking unsuccessfully to suppress evidence, Scull pled guilty to one count of possession with intent to deliver more than 40 grams of cocaine and to one count of keeping a drug house. The trial court sentenced him to 11 years of imprisonment on the two counts.

Scull appealed, unsuccessfully. Because the parties agreed that, under Jardines, the search warrant for Scull's home was invalid, the only question for the Court of Appeals was whether the subsequently discovered drug evidence was admissible through the good faith exception to the exclusionary rule. The Court of Appeals noted that, under the good faith exception, the exclusionary rule does not apply when the officers conducting an illegal search acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. The Court of Appeals ruled that the good faith exception to the exclusionary rule applies because: (1) the process used in obtaining the search warrant included a significant investigation and a review by a knowledgeable government attorney; and (2) prior to Jardines, dog-sniff searches of the type presented in this case had been held lawful in many jurisdictions.

Scull contends that the only piece of evidence in the search warrant affidavit linking drugs to Scull's home was the alert from the drug-sniffing dog – a dog which, per Jardines, was sniffing around on Scull's property unconstitutionally.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 7, 2014
9:30 a.m.
COURTROOM C215, WAUKESHA COUNTY COURTHOUSE

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Jean A. DiMotto, presiding.

2013AP1163 State v. Hemp

This case examines the manner in which expunction of a court record of a conviction is accomplished. The underlying Milwaukee County Circuit Court conviction for possession of marijuana with intent to deliver is not at issue. It is uncontested that Kearny W. Hemp successfully completed his probation on that conviction. The trial court record shows that at Hemp's sentencing hearing, the judge indicated she would grant expunction of the conviction upon Hemp's successful completion of probation.

About 8 months after he completed probation, Hemp was charged in Walworth County Circuit Court on one count each of possessing THC, possessing drug paraphernalia and operating while intoxicated. When Hemp sought to verify his Milwaukee conviction had been expunged, questions arose about expunction requirements, and those issues are now before the Supreme Court.

In the process of trying to verify expunction of the Milwaukee County case, Hemp apparently learned that he needed to file "Form CR-266" to accomplish expungement. On Oct. 30, 2012, Hemp, by counsel, filed the form, and the circuit court ordered proof that Hemp successfully completed probation and paid his financial obligations. Hemp's counsel did not respond.

On Dec. 18, 2012, Hemp, represented by different counsel, filed another request for expungement, along with the requested proof. The record reflects that the required discharge certificates were forwarded to the circuit court and that the case status was changed to "discharged," effective Dec. 18, 2011.

In light of the Walworth County charges, the Milwaukee County Circuit Court issued an order requiring Hemp to file a personal statement explaining "why he believes the court should order an expungement under these circumstances." After considering Hemp's personal statement and the state's response, the circuit court denied Hemp's petition to expunge the court record of his Milwaukee County conviction.

Hemp appealed, and the Court of Appeals affirmed, ruling that a defendant does not receive court-ordered expunction automatically. The Court of Appeals ruled that after successfully completing his sentence or probation, the defendant must affirmatively petition the circuit court by signing Form CR-266, and attaching the discharge certificate issued by the detaining or probationary authority. The Court of Appeals reasoned that other statutes concerning expungement require a defendant to petition himself.

Hemp says the Court of Appeals' interpretation reads significant obligations into § 973.015 not found there, such as the requirement to file the form, to obtain various documents, to sign the form in front of a notary, and to submit the materials to the circuit court. These action items, according to the Court of Appeals, are "*the sole responsibility of the defendant*."

In making his case, Hemp cites Stuart v. Weisflog's Showroom Gallery, Inc., 2006 WI App 109, ¶49, 293 Wis. 2d 668, 721 N.W.2d 127 (courts will not superimpose requirements not expressed by the Legislature onto a statute).

Hemp raises the following issues for Supreme Court consideration:

- Was Hemp's conviction expunged upon successful completion of his sentence?
- Was Hemp required to petition the circuit court for expungement upon successful completion of his probation?
- May the circuit court unilaterally modify a sentence, *sua sponte*, to revoke probation that was duly granted?

A decision by the Supreme Court is expected to clarify the requirements for expunction.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 7, 2014
11 a.m.
COURTROOM C215, WAUKESHA COUNTY COURTHOUSE

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Outagamie County Circuit Court decision, Judge Dee R. Dyer, presiding.

2013AP1638-FT Outagamie County v. Michael H.

This case examines two issues arising from the court-ordered mental health commitment of Michael H. after a jury trial:

- Do thoughts of suicide or self-harm, without an articulated plan for acting on those thoughts, constitute "threats" of suicide or serious bodily harm necessary to establish dangerousness under Wis. Stat. § 51.20(1)(a)2.a.?
- Was the evidence sufficient under a second standard specified in Wis. Stat. § 51.20(1)(a)2.c., which requires evidence of such impaired judgment, manifested by a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury?

Some background: To place an individual under a Wis. Stat. ch. 51 civil commitment, a county must prove by clear and convincing evidence that an individual has a mental illness, is a proper subject for treatment, and is dangerous. See Wis. Stat. § 51.20(1)(a), 51.20(13)(e).

In April 2012, Michael H. was diagnosed with a mental illness, a "psychotic disorder." He became a patient at Theda Clark Hospital in Appleton. Sometime after that episode, Michael moved to Minnesota. In February 2013, Michael returned to Appleton for a family visit. When he arrived on the weekend, his mother noticed Michael was exhibiting some of the symptoms he had shown the previous April.

During the following week, Michael complained that people were after him and that others, including his relatives, may be in danger. He asked to be taken to the hospital several times but was denied admission at two hospitals because he refused medication, and, according to his mother, "he hadn't threatened to hurt anybody or himself and he didn't have insurance."

On Feb. 15, 2013, he again asked to go to the hospital, complaining he could not think straight and he felt lonely. A nurse testified she asked Michael "what brought them in this evening and was told that he was having increasing depression and suicidal ideation." Specifically, Michael told the nurse "he was feeling suicidal but had no plan as to how he would harm himself and denied wanting to harm anyone else."

The nurse left the room to call the county crisis worker so that Michael could be evaluated. During this time, Michael's mother testified that she asked Michael about his plans and what he was thinking. He told her it was too hard to explain and too long. A few minutes later, Michael suddenly got up off the bed, grabbed his jacket, said, "I'm out of here," and he ran away.

The mother called police, who found Michael sitting on a park bench. Police said Michael was cooperative, and he denied having made comments at the hospital about suicide or

wanting to harm himself. Police returned Michael to the hospital from which he had run for an evaluation by a crisis worker. The nurse later testified that she took Michael's threat of suicide seriously. A police officer testified that she prepared an emergency detention for Michael because she believed he was dangerous. The officer testified that in her mind Michael's stated desire to harm himself had been a "threat."

Outagamie County subsequently filed a petition for civil commitment under Wis. Stat. ch. 51, and a commitment hearing was held. A jury found that Michael had a mental illness, that he was a proper subject for treatment, and that he was dangerous. The circuit court therefore committed Michael for six months and found him incompetent to refuse medication.

Michael appealed the initial commitment order, and the Court of Appeals affirmed, leading to this appeal before the Supreme Court.

Michael does not dispute the jury's findings on the first two elements; he concedes he has a mental illness and is a proper subject for treatment. Michael argues, however, that the county failed to meet its burden of proving he is "dangerous," pursuant to § 51.20(1)(a)2.

Neither the parties nor the Court of Appeals cited an appellate decision that has interpreted the term "threats" in Wis. Stat. § 51.20(1)(a)2.a. While both sides argued that the Court of Appeals should adopt a "common definition" of that term, they could not agree on which common definition should be used. It is the interpretation of the statutory term "threat" in the context of self-harm for purposes of the civil commitment statute that the Supreme Court is being asked to resolve.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 7, 2014
2 p.m.
COURTROOM C215, WAUKESHA COUNTY COURTHOUSE

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Jeffrey A. Wagner, presiding.

2013AP843-CR State v. Alexander

This criminal case examines whether the Court of Appeals may choose to review a case under an ineffective assistance of counsel analysis, even though that claim was not raised in the lower court or in the parties' appellate briefs.

Some background: In January of 2012, Danny Robert Alexander was charged with and pled guilty to one count of felony forgery. The criminal complaint alleged that he produced two checks for payment to two separate U.S. Bank locations, one in the amount of $1,749.13 and the other in the amount of $1,454.23. Both checks were drawn out of the account of Silver Mill Management Company. The defendant received cash for both checks. The offenses were committed while he was on extended supervision for another offense.

The circuit court accepted his plea and ordered a presentence investigation report (PSI). The court received copies of the PSI before the sentencing hearing. The report was prepared by a probation agent, but not the agent who had been supervising the defendant's most recent period of supervision. The PSI was compiled from Department of Correction (DOC) supervision file materials and interviews of collateral witnesses. The agent attached a copy of two statements Alexander had made to his probation agent as part of a revocation in a different case. In the statements, the defendant described cashing the two checks involved here, as well as cashing two other checks from the account of Dave's Machine Repair. The forms on which the statements appeared, DOC Forms 1305/1305A, indicated that the defendant was to "account in a truthful and accurate manner" for his activities and that failure to do so would be a violation for which he could be revoked. The form stated that "none of [the] information [in the DOC forms] can be used against me in criminal proceedings."

At the sentencing hearing, the court asked defense counsel if he had reviewed the PSI with the defendant. Counsel responded, "Yes. You saw the pre-sentence, right?" The defendant responded in the affirmative. No further questions were asked of either the defendant or his attorney as to whether the defendant reviewed or understood the PSI.

Defense counsel told the court that the PSI author had never actually interviewed the defendant. The court said, in reliance on the PSI, that the defendant engaged in continued criminal activity and that he had been revoked multiple times. When the court gave the defendant a chance to speak, the defendant expressed concerns about the PSI, saying he was trying to get his life back on track and that the PSI author included "false allegations in the report."

The PSI author recommended a confinement term of three or four years, followed by three years of extended supervision. Alexander was sentenced to three years of initial confinement and four years of extended supervision. The court said it was "going to follow the recommendation of the pre-sentence to some extent."

Alexander filed a post-conviction motion asking for a new sentence. He argued that the PSI author had wrongfully included the DOC forms containing incriminating statements made to the probation agent. He also alleged that his attorney never reviewed the PSI report with him. The sentencing court denied the motion.

Alexander appealed. The Court of Appeals, with Judge Ralph Adam Fine dissenting, reversed and remanded. On appeal, Alexander argued that he was entitled to resentencing before a different judge because the sentencing court considered protected statements made to a probation agent in making its sentencing decision. The Court of Appeals agreed with Alexander.

The Court of Appeals noted that a person may not be compelled in any criminal case to be a witness against himself, and the privilege against self-incrimination extends to persons on probation. It also noted that a probationer's answers to an agent's questions prompted by accusations of criminal activity are compelled since a refusal to speak may be grounds for revocation.

The state conceded on appeal that the defendant's statements to his probation agent about the multiple checks he cashed were in fact compelled statements subject to immunity. The state's argument was that since defense counsel failed to object to the inclusion of the statements at the sentencing hearing, the defendant forfeited his right to pursue the issue on appeal. In the alternative, the state argued that the statements were not actually incriminating and that the erroneous inclusion of the statements in the PSI was harmless.